No. 84-1272

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA,

Appellee,

v.

MICHAEL E. CAREY,

Petitioner.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI FOR PETITIONER

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QUESTION PRESENTED FOR REVIEW

I. Whether The Court Of Appeals For The Fourth Circuit Erred In Applying, In The Context Of The Speedy Trial Act, The Same Standard For Exclusion Of Delay Caused By A Joinder Of Defendants To A Joining Of Multiple Counts Arising From Separate Indictments Against A Single Defendant?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is included as Appendix A. The opinion has been reported as 746 F.2d 228 (1984).

STATEMENT OF JURISDICTIONAL GROUNDS

The opinion of the United States Court of Appeals for the Fourth Circuit was decided on October 17, 1984. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

PROVISIONS AND STATUTES

Speedy Trial Act, 18 U.S.C. § 3161 *et seq.*

Pertinent Provisions are set forth in Appendix D.

STATEMENT OF THE CASE[1]

On June 8, 1983, Petitioner Michael E. Carey was arrested by Drug Enforcement Administration agents for unlawfully possessing cocaine with intent to distribute. Carey first appeared before a judicial officer of the United States, Magistrate Burgess, on the following day, June 9, 1983, on a criminal complaint charging Carey with possession of cocaine with intent to distribute in violation of Title 21, United States Code, Section 841 (a)(1). After this initial appearance on June 9, 1983, the Petitioner was released on his own recognizance. On June 22, 1983 a two-Count indictment was filed and made public, charging Carey with two (2) counts of unlawful distribution of cocaine in violation of Title 21, United States Code, Section 841 (a)(1). Petitioner was arraigned on these charges before Magistrate Paul M. Rosenberg on July 1, 1983 and entered pleas of not guilty to each charge. At this time a trial date, before the Honorable Herbert F. Murray, of September 6, 1983 was assigned.

On September 2, 1983, counsel for petitioner Carey filed a *Motion to Dismiss Indictment for Lack of Speedy Trial*. A hearing and oral argument on the motion were held before Judge Murray on October 12, 1983, and the Court, on November 14, 1983 Ordered that a continuance of one day, September 1, 1983, be entered *nunc pro tunc*. Additionally, the order required that September 1, as well as the period between the filing of the motion and the entry of the Judge's Order be excluded from the computation for speedy trial, pursuant to provisions of the Speedy Trial Act. On November 15, 1983, Carey proceeded to trial on a statement of stipulated facts and was found guilty on both counts. On January 26, 1984, petitioner was sentenced, as to the first count, to a term of three (3) years imprisonment as well as a special parole term of three (3) years,

[1] Dates have particular significance because a Speedy Trial Act violation is alleged.

with a concurrent sentence as to the second count. Petitioner filed a timely Notice of Appeal which alleged 1) a violation of the Speedy Trial Act's seventy-day limitation for bringing an accused to trial and 2) that the trial court had erred by granting a continuance *nunc pro tunc*. 18 U.S.C. Section 3161. The issues were submitted in appellate briefs on August 30, 1984, before the Honorable Chief Judge Winter, Circuit Judge Sprouse and Senior Circuit Judge Butzner of the United States Court of Appeals for the Fourth Circuit. In an opinion dated October 17, 1984, the Court of Appeals held that the granting of a *nunc pro tunc* continuance was not harmless error but, that in the context of the Speedy Trial Act, the joining of multiple offenses against a single defendant is analogous to the joinder of defendants. The Court stated that the same standard for exclusion of delay caused by joinder of defendants should apply and that the Speedy Trial Act would be interpreted as excluding a reasonable delay in joinder of counts in order to end the seventy (70) day period simultaneously for all counts. Using this reasoning, the Court of Appeals affirmed the petitioners conviction.

ARGUMENT

I.

THE COURT OF APPEALS FOR THE FOURTH CIRCUIT ERRED IN APPLYING, IN THE CONTEXT OF THE SPEEDY TRIAL ACT, THE SAME STANDARD FOR EXCLUSION OF DELAY CAUSED BY JOINDER OF DEFENDANTS TO A JOINDER OF MULTIPLE COUNTS ARISING FROM SEPARATE INDICTMENTS AGAINST A SINGLE DEFENDANT.

Petitioner Carey was arrested and charged with unlawfully possessing cocaine with intent to distribute and came before Magistrate Burgess on June 9, 1983. However, an indictment was returned on June 22, 1983, charging the petitioner in two (2) counts with distribution of cocaine. This indictment charged an additional offense

beyond the initial episode in the complaint of June 9, 1983, and petitioner Carey was arraigned on the two count indictment on July 1, 1983. Subsequently, on September 2, 1983, a Motion to Dismiss indictment for lack of Speedy Trial was filed.

The Speedy Trial Act (Act), 18 U.S.C. § 3161 (c)(1) provides in part:

> In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the Commission of an offense shall commence within seventy days of the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs.

The District Court denied the Motion to Dismiss, even though they held the 70 day period had expired on September 1, 1983, by entering on November 14, 1983, a continuance of one day *nunc pro tunc* on September 1, and by holding that the time between the filing of the motion and the date of its decision was excludable pursuant to § 3161(h)(1)(F) and (J). The district court also reasoned that if denial of the motion was erroneous, it would be harmless. However, the Court of Appeals for the Fourth Circuit in its opinion, stated that the district court's *nunc pro tunc* continuance was *not* authorized by the Act and that an invalid *nunc pro tunc* continuance was not harmless error, 746 F.2d 228, at 230.

The Fourth Circuit nevertheless affirmed the district court's conviction of petitioner Carey as being within the 70 day period specified by the Speedy Trial Act by holding that a prosecution that is timely for one count in a multi-count indictment is timely for all counts. The question presented to the Fourth Circuit was one of first impression and the Court's holding decides an important

question of federal law which has not been, but should be, settled by this Court. In reaching their conclusion, the Fourth Circuit reasoned that, in the context of the Speedy Trial Act, joining multiple offenses against a single defendant is analogous to joinder of defendants, and therefore, the same standard for exclusion of delay caused by the joinder of defendants should apply. The Act, in reference to joinder of defendants in a single trial, permits "a reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted." *See* § 3161 (h)(7). The First Circuit, in the case of *United States v. Rush*, 738 F.2d 497, at 503-04, has interpreted § 3161 (h)(7) to make an exclusion for one defendant applicable to all defendants thereby, in effect, simultaneously ending the 70-day period for codefendants.

The Fourth Circuit, in applying the analogy between joinder of counts and joinder of defendants, in order to end the 70-day period simultaneously for all counts, argues that this holding is in accordance with Congressional intent in enacting the Speedy Trial Act. However, the Court through this holding, has created new excludable time not contemplated by the Act and in so doing has flagrantly ignored Congressional intent. Congress, in drafting and enacting the Speedy Trial Act, specifically and lengthily stated the grounds for excludable time in the computation of the 70-day statutory period the government has to bring a criminal defendant to trial. One must assume that Congress, in the drafting of this legislation, was aware of multiple count indictments often filed on different dates, just as they were aware of multiple defendants in a single trial often charged separately. Yet Congress chose to include joinder of defendants as grounds for excludable time under the Act but nowhere specifically addresses the issue of joinder of multiple counts. Therefore, one must conclude that this

omission was deliberate and Congress intended that the Act not include joinder of counts in the computation of excludable time. The Fourth Circuit, in their holding, exceeded their judicial function by effectively legislating; their creation of an addition to a Congressional Act bypassed the traditional legislative function granted exclusively to Congress.

In addition, the Fourth Circuit was erroneous as the analogy between joinder of defendants and joinder of counts is faulty when examined in the context of the purpose of the Speedy Trial Act. The Act was enacted for protection of the rights afforded criminal defendants in our criminal justice system. When a new defendant is added to a previously scheduled trial the new defendant has the statutory right to trial within 70-days but there is also concern over not bringing him to trial prematurely. Taking this concern for the second defendant into account, one can easily see why the Act allows excludable time from the 70-day computation period for joinder of defendants. However, these concerns do *not* extend to joinder of counts in a multiple-count indictment. When a count is added to the same criminal defendant the only concern is the right of that defendant to a speedy trial on the count for which he has already been charged; the creation of additional excludable time from the 70-day period does not address this concern and is therefore not congruent with the intent of the Speedy Trial Act.

Lastly, the Fourth Circuit erred in creating new excludable time in the Act as this judicial addition to the Act was clearly unnecessary. The language of the Speedy Trial Act specifically provides for a remedy if a violation of the 70-day period is found, yet the court chose not to utilize this statutory provision. Congress provided in the Speedy Trial Act for dismissal of the prosecution without prejudice if the time limits prescribed by the Act are not met, 18 U.S.C.A. §§ 3161 et seq., 3161 (h)(A), 3162; this

opportunity was included to create a remedy to a problem like the one at bar but yet still prohibit a violation of the intent of the Act. The Court itself stated that ". . . the Government's intention to seek another indictment affords no justification for refusing to impose a sanction that Congress has mandated." 746 F.2d at 230.

CONCLUSION

For the reasons set forth above, the Petitioner requests that this Court should grant this petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, in order that this Court may consider all of the questions raised by the record.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For The Fourth Circuit

No. 84-5043

United States of America,

Appellee,

v.

Michael E. Carey,

Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Herbert F. Murray, District Judge. (CR HM-83-00247)

Submitted: Sep. 5, 1984 *Decided: Oct. 17, 1984*

Before WINTER, Chief Judge, SPROUSE, Circuit Judge, and BUTZNER, Senior Circuit Judge.

(Gerald A. Kroop, Kroop & Kurland, P.A. on brief) for appellant; (J. Frederick Motz, United States Attorney, James C. Savage, Assistant United States Attorney on brief) for appellee.

BUTZNER, Senior Circuit Judge:

Michael E. Carey appeals his conviction for distribution of cocaine. The sole issue is whether his trial commenced within the time limits imposed by the Speedy Trial Act, 18

U.S.C. § 3161 *et seq.* Following recent precedent that was not available to the district court, we decline to affirm on the basis of its opinion. The government, however, presses an alternative ground for affirmance that we find acceptable.

I.

Federal agents arrested Carey on June 8, 1983, charging possession of cocaine with intent to distribute it in violation of 21 U.S.C. § 841(a). On June 9, he appeared before a magistrate on that charge. A grand jury indicted him on June 22, for two counts of cocaine distribution. The first count accused Carey of distributing cocaine on May 23, 1983. a charge not raised in the earlier complaint or appearance before the magistrate. The second charged distribution on June 8, based on the same conduct for which he had already appeared before the magistrate. Carey was arraigned July 1, on the two count indictment, and the district court set a trial date of September 6.

Carey's counsel moved to dismiss the indictment on September 2, for failure to try Carey within 70-days as required by 18 U.S.C. § 3161(c)(1).[1] The motion was premised on the assumption that the 70-day period began on June 22, the date of the indictment, because Carey

[1] Section 3161(c)(1) provides in part:

> In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days of the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs.

Thus if a defendant has appeared before a judicial officer in connection with a charge before the indictment is filed, the filing of the indictment starts the 70-day period. If prosecution originates with an indictment, the period runs from the defendant's first appearance after indictment. *See* Guidelines to the Administration of the Speedy Trial Act (1983) at 7-8.

previously had appeared before a judicial officer on the complaint. The motion was argued October 12, and on November 14, the court entered an order denying it.

The court accepted June 22, as the start of the 70-day period and concluded that time expired on September 1. It justified denial of the motion to dismiss by entering on November 14, a continuance of one day *nunc pro tunc* on September 1, and by holding that the time between the filing of the motion and the date of its decision was excludable pursuant to sections 3161(h)(1)(F) and (J). In a written opinion accompanying its order, the court observed that a docket omission had caused it to set a September 6 trial date. It explained that the continuance was entered pursuant to section 3161(h)(8)(A) to serve the ends of justice. Its findings to support the *nunc pro tunc* continuance, however, were based on incidents that the court did not consider to be grounds for a continuance until after the defendant filed his motion to dismiss.

As an alternative ground for denying the motion to dismiss, the court pointed out that dismissal, if granted, would be without prejudice. Because the government expressed its intention to indict the defendant again if the indictment were dismissed, the court concluded that dismissal would be useless. Consequently, it reasoned, if denial of the motion were error, it would be harmless.

The court tried Carey on November 15, and found him guilty.

II.

Section 3161(h)(8)(A), on which the court relied, excludes delay resulting from a continuance granted on the basis of findings that the ends of justice served by the continuance outweigh the best interests of the public and the defendant in a speedy trial. Recent cases uniformly hold that *nunc pro tunc* or retroactive continuances that

are made after the expiration of the time within which the defendant should have been tried for reasons the judge did not consider before lapse of the allowable time are inconsistent with the Act. *See* United States v. Frey, 735 F.2d 350 (9th Cir. 1984); United States v. Richmond, 735 F.2d 208 (6th Cir. 1984); United States v. Janik, 723 F.2d 537 (7th Cir. 1983); United States v. Carrasquillo, 667 F.2d 382 (3d Cir. 1981). The opinions in these cases are based upon thorough analysis of the Act and consideration of its legislative history. We agree with the conclusions they reach about the invalidity of *nunc pro tunc* continuances after expiration of the time prescribed by the Act for the commencement of the trial.[2]

Also, we cannot accept the district court's alternative ruling that the *nunc pro tunc* continuance was harmless error. Congress provided in section 3162 for dismissal of the prosecution with, or without, prejudice if the time limits prescribed by the Act are not met. As *Janik* points out, the government's intention to seek another indictment affords no justification for refusing to impose a sanction that Congress has mandated. *See* 723 F.2d at 546.

Because we conclude that the district court's *nunc pro tunc* continuance was not authorized by the Act and that an invalid *nunc pro tunc* continuance is not harmless error, we turn to the alternative ground the government urges for affirmance.

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[2] The retroactive continuances that are forbidden should not be confused with a continuance granted for valid reasons before the expiration of the allowable time for commencement of the trial and documented by findings of the court after the time has expired. A continuance granted and substantiated under these circumstances validly excludes the time that it encompasses. *See* United States v. Brooks, 697 F.2d 517 (3d Cir. 1982); United States v. Clifford, 664 F.2d 1090 (8th Cir. 1981); United States v. Edwards, 627 F.2d 460 (D.C. Cir. 1980).

III.

The government argues that properly computed the timing of Carey's prosecution satisfied the Act. It points out that count I of the indictment, unlike count II, charged an offense for which Carey had never previously appeared before a judicial officer. Consequently, the 70-day period ran from July 1, when Carey was arraigned. 18 U.S.C. § 3161(c)(1). Computed according to Federal Rule of Criminal Procedure 45(a), the period extended to Monday, September 12. Thus, the motion to dismiss filed on September 2, was within the 70-day period. The motion and subsequent proceedings with respect to it excluded the time from September 2, to November 14. *See* §§ 3161(h)(1)(F) and (J). Carey was tried on November 15. According to the government's calculation, only 63 nonexcludable days elapsed between arraignment and trial.

The government's factual premise is correct with respect to count I. If, however, count II is considered independently, Carey's trial on this count did not commence within the 70-day period required by the Act. The government, recognizing this problem, asserts that it should be solved by holding that a prosecution that is timely for one count in a multicount indictment is timely for all counts.

The government disclaims reliance on sections 3161(d)(1) and (h)(6), which are predicated on dismissal of the complaint or indictment. It acknowledges that its argument raises an issue that the Act does not specifically address. Nevertheless, it insists that the Act does not contemplate splitting a multicount indictment according to the different time frames that the Act would have imposed if single-count indictments had been returned.

The government points out that the Act deals with a similar problem, the joinder of defendants in a single trial,

by permitting "a reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted." *See* § 3161(h)(7). This provision was enacted "to make it absolutely clear that Congress did not intend to alter the traditional rules of severance." *See* A. Partridge, Legislative History of Title I of the Speedy Trial Act of 1974 (Fed. Judicial Center 1980), at 135-36. Section 3161(h)(7) has been interpreted to make an exclusion for one defendant applicable to all defendants. This, in effect, simultaneously ends the 70-day period for codefendants. *See* United States v. Rush, 738 F.2d 497, 503-04 (1st Cir. 1984).

In the context of the Speedy Trial Act, joining multiple offenses against a single defendant is analagous to joinder of defendants. Consequently, the same standard for exclusion of delay caused by the joinder should apply. Here the delay was reasonable. Only nine days elapsed between the return of the indictment and the date of arraignment.[3]

Interpreting the Act to exclude a reasonable delay in the joinder of counts in order to end the 70-day period simultaneously for all counts preserves the traditional rules of severance in accordance with congressional intent. We, therefore, conclude that Carey's trial on both counts was timely, and his conviction is affirmed.

AFFIRMED.

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[3] In similar situations, the clerk, of course, should properly record the period of delay in accordance with the *Guidelines* for § 3161(h)(7).

APPENDIX B

In The United States District Court
For The District Of Maryland

Criminal No. HM83-00247

United States of America

v.

Michael E. Carey

MEMORANDUM

Defendant Michael E. Carey has filed a motion to dismiss on the basis that he was not brought to trial within the time limit required by the Speedy Trial Act, 18 U.S.C. § 3161 *et seq.* A hearing on this matter was held before the court on October 12, 1983. Having carefully considered the matter, including the papers submitted and the arguments of counsel, the court finds that there has been no violation of the Speedy Trial Act, and therefore, defendant's motion to dismiss is hereby denied.

The facts relevant to this determination are as follows: Defendant Carey first appeared before Magistrate Burgess, a judicial officer of this court, on June 9, 1983, on a criminal complaint charging him with possession of cocaine with intent to distribute in violation of 21 U.S.C. 841(a)(1), at which time he was released on his own recognizance. (paper #3, filed 6/23/83; paper #4, filed 7/13/83). A two-count indictment on that charge was filed on June 22, 1983. (paper #1) He was arraigned and entered a plea of not guilty before Magistrate Rosenberg

on July 1, 1983. At his arraignment, the trial was set for Tuesday, September 6, 1983, Monday of that week being a federal holiday. Under the provisions of the Act, 18 U.S.C. § 3161(c)(1), the trial of his case was required to

> commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs.

Excluding the one day when the defendant was arraigned before the Magistrate, § 3161(h)(1), *United States v. Haiges*, 688 F.2d 1273 (9th Cir. 1982), defendant Carey should have been tried within seventy days of the filing of the indictment, i.e., by September 1, 1983.

From the beginning, the court intended to comply with the Act although the September 6, trial date as set, was outside the requirements of the Act. This date was set on the basis of information contained on the docket sheet then available to the court which indicated that the indictment had been filed on 6/22, and which failed to indicate that an initial appearance had previously occurred. It was determined therefore that the later of the two triggering dates mentioned in § 3161(c) was the arraignment that was scheduled to take place on July 1. Under those facts, the seventieth day under the Act was September 9, rather than September 1, as it now appears. Consequently, the court scheduled the trial for September 6, (well within the Act as then viewed) and informed Magistrate Rosenberg to advise counsel of that trial date. Neither government nor defense counsel raised this potential speedy trial problem at the pretrial conference held in this case on July 20, 1983.

The government asserts that the defendant clearly intended to mislead both the court and government counsel into believing that time was required to negotiate a plea.

The government further asserts that it was prepared to try the case within the time limits of the Act and did not attempt to set a trial date within that period because of counsel's representations that defendant would definitely plead. The government therefore urges the court to grant a continuance *nunc pro tunc* pursuant to § 3161(h)(8) (A) & (B) to enable the defendant to determine the option of the plea of guilty which he has indicated he wishes to enter.

Defense counsel asserts that his plea discussions with government counsel were general in nature. He further states that he made no commitments about a plea and that the government did not make any firm plea offers.

In the case of *United States v. Cameron,* this court entered an order, *nunc pro tunc,* excluding time pursant to § 3161(h)(8)(A) & (B), and thereby found that the trial of defendant Cameron did not fall outside the requirements of the Act. 510 F. Supp. 645 (D. Md. 1981), *aff'd,* No. 81-5101 (4th Cir., Dec. 31, 1981). That case, however, presented a different factual situation from the instant one. Noting that defendant Cameron's actions were not in good faith, the court found that the ends of justice in permitting defendant to change counsel two weeks before trial and in permitting her an opportunity to have her case dismissed in exchange for cooperating with the government in prosecuting alleged bank robbers, pursuant to a written plea offer, outweighed the interests of the public and of the defendant herself in a speedy trial. *Id.* at 650. In *Cameron,* defense counsel did not deny that the plea offer was actually under consideration by the defendant during the time which the court eventually excluded from computation. Nor again was there a denial that the original trial date which fell within the Act's time requirements was postponed at the request of then newly retained counsel to permit adequate preparation for trial. The plea negotiations in this case were not as formalized

as those in *Cameron*. Therefore, the court cannot exclude time on that basis.

It does not seem to promote the administration of justice, however, for a defendant to lie in wait knowing that the scheduled trial date will not assure a speedy trial as required by the Act, and then move to dismiss on those grounds. Nor did Congress intend such a result when it passed the Act. At least as to the setting of the initial trial date within the Act's requirements, the Act contemplates that an appropriate date be set by the court "at the earliest practicable time, . . . *after consultation with the counsel for the defendant and the attorney for the Government,* . . . so as to assure a speedy trial." 18 U.S.C. § 3161(a) (emphasis supplied). Counsel therefore were required to bring to the court's attention "at the earliest practicable time", the fact that the September 6 trial date was outside the requirements of the Act. Government counsel's failure to do so, based on his understanding that defendant would waive any speedy trial issues by pleading guilty, is excusable. The record bears out that the prosecutor, in fact, had a good faith belief that no speedy trial problem would arise because defendant intended to plead guilty.

In anticipation of the commencement of pretrial proceedings in *United States v. Anthony Grandison, et al,*[1] another criminal matter then pending before the court, my law clerk, at my instance, early during the week of August 29, 1983, contacted government counsel to ascertain whether the *Carey* trial would be going forward as

[1] Because the *Grandison* case was expected to involve approximately two weeks of hearings on pretrial motions, extensive individual voir dire of jurors, and a five to six week trial, the court took substantial care in arranging its schedule to avoid any speedy trial problems in other cases and to properly accommodate the schedules of the various counsel involved in all the pending cases.

scheduled on September 6, so as to confirm for counsel in the *Grandison* matter whether their proceedings would be interrupted by the *Carey* trial. At that time, government counsel indicated that he expected that a plea would be entered in the *Carey* case, and advised that he would get back to the court after he had contacted defense counsel on this issue. On various occasions during that week, government counsel advised my chambers that he had been unsuccessful in contacting defense counsel because defense counsel was involved in a state proceeding. The prosecutor indicated that he had left messages with defense counsel's office and expected to hear from him directly. Finally, on September 1, and again on September 2, the court, concerned with the uncertainty in the matter, attempted to reach defense counsel to get some clarification on the status of the case. Defense counsel's receptionist advised the court that he was unavailable because he was involved in a proceeding in state court. It was not until the afternoon of September 2, that defense counsel returned the telephone messages left for him by my chambers. On the afternoon of September 2, he indicated to my law clerk that the trial would not need to go forward on September 6, because a motion had been filed that would, until ruled on, exclude any subsequent time for purposes of Speedy Trial calculations; the motion turned out to be the instant motion to dismiss.

The court finds that although there might have been a misunderstanding between counsel as to the seriousness of the plea negotiations, such discussions did take place. Government counsel's perhaps erroneous belief that a plea would be entered in this case is by no means a recent fabrication intended to avoid the proscriptions of the Speedy Trial Act.

On the other hand, defense counsel by his own admission knew that a plea would not be entered and was therefore bound under § 3161(a) of the Act to disclose to

the court "at the earliest practicable time" that the date then set for trial would not "assure a speedy trial". The earliest practicable time cannot have been intended to be a time after the possibility of a speedy trial was past. This is especially true where, as here, the court had telephoned defense counsel and left a message for him to return the call at a time when the case might have still been tried within the requirements of the Act. Moreover, the court disagrees with defense counsel's proposition that it would have been the highest form of incompetence for him to have alerted the court of the potential speedy trial problem. He is after all an officer of this court. It may be true that once an appropriate date is set, a defendant or his counsel has no continuing duty to press for a speedy adjudication in order to assert a defendant's rights under the Act. That was not the situation in the instant case. At a minimum, a defense counsel who is aware of a speedy trial problem, should make himself available to the court, especially after receiving a telephone call from the court on the last possible date when under his own calculations the trial of his client's case was required to commence.

As the government noted in its opposition, the prosecution was prepared to go to trial within the time limits of the Act. The court would have been willing to hear the trial of this case on September 1. The only other matter before the court on that date was the motions hearing in *Grandison*. Those hearings were scheduled to take more than a week and the court intended and was fully prepared to interrupt those hearings on September 6, to try the *Carey* case. It would have been equally possible and probably more efficient in terms of the potential interruption of the *Grandison* matter, for the court to have scheduled and tried the *Carey* case on September 1, rather than on September 6. The only unavailable party therefore was defense counsel.

Under these circumstances, therefore, the court finds that at a minimum, September 1, should be an excludable time period for purposes of Speedy Trial Act computation, pursuant to § 3161(h)(8)(A). The court further finds that the ends of justice served by granting a one-day continuance for the period of September 1, 1983, due to the unavailability of defense counsel outweigh the public interest and the defendant's own interest in a speedy trial. Indeed, the court finds that the interests of the public and of the defendant in this case converge. Both the public and the defendant have an interest in seeing that the date of trial in criminal cases be initially set so as to assure a speedy trial. In this case had the defense counsel been available, a trial within the requirements of the Act could in fact have been held. As evidenced by Congressional enactment of § 3161(a), the public's interests are served when such an obligation is reposed on the court and all counsel, prosecution as well as defense. To be sure, government counsel is not entirely free of blame in this case since he had a responsibility to assure compliance with the Act by ensuring that whatever plea negotiations were undertaken did not interfere with the applicable speedy trial date. The court was also lax in this respect. However, these good faith errors, when viewed in light of the attempts made by both the court and the prosecutor to reach defense counsel during the week of August 29, do not tip the balance of equities to preclude the granting of the instant *nunc pro tunc* continuance. Additionally, the court notes for the record, pursuant to § 3161(h)(8)(B)(i), that the failure to grant an exclusion in this case would result in a grave miscarriage of justice in that it would permit a defendant to lie in wait and exploit the provisions of the Act to avoid prosecution. The Act's intended purpose was to secure a speedy trial for the defendant and thereby to also satisfy society's interest in seeing that justice be done without undue delay. It was not

intended to facilitate the result which defendant seeks in this case. *See generally United States v. Cameron, supra.*

Moreover, as in *Cameron,* the court finds that even if its findings today are in error, given the government's representation that it would reindict without hesitation were the case to be dismissed without prejudice,

> the court finds that dismissing the case without prejudice only to have it begin anew would be a useless act, and the court is unwilling to indulge in such a merry-go-round. By the same token, [as a charge of distribution of cocaine is a serious offense] and as the reprosecution of this case would not adversely affect either the administration of the Speedy Trial Act in future cases or the administration of justice in general, this court could not (even if it were so inclined), consistent with § 3162(a)(2), dismiss this case with prejudice. Thus it can readily be appreciated that even if refusal to dismiss this case without prejudice is error, the imminence of reindictment makes it harmless error: harmless, that is, to the rights of defendant under the Act, but quite harmful to the United States in terms of the expense and inconvenience in presenting the matter anew before the Grand Jury and recommencing the entire pretrial process.

Id. at 651.

The court will therefore deny defendant's motion to dismiss. Additionally, as defense counsel indicated to the court that in the event the instant motion were denied, his client would proceed to be tried before the court upon stipulated facts, the court is hereby setting this case in for such a trial for Tuesday, November 15, 1983 at 9:15 a.m. This date is mandated by the Speedy Trial Act.

The court will enter a separate order embodying the above ruling.

Dated: November 15th, 1983

HERBERT F. MURRAY,
United States District Judge.

APPENDIX C

In The United States District Court
For The District Of Maryland

Criminal No. HM83-00247

United States of America

v.

Michael E. Carey

ORDER

For the foregoing reasons, it is this 14th day of November 1983 by the United States District Court for the District of Maryland,

ORDERED:

(1) that a continuance of one day, September 1, 1983, be entered in this case, *nunc pro tunc,* under the provisions of 18 U.S.C. § 3161(h)(8);

(2) that the day of September 1, 1983 be excluded from computation for Speedy Trial Act purposes pursuant to the findings made herein;

(3) that defendant's motion to dismiss be, and the same hereby is, *Denied*;

(4) that the time from the filing of defendant's motion to dismiss on September 2, 1983, to the hearing on this

matter on October 12, 1983 be excluded for purposes of Speedy Trial Act computations, pursuant to 18 U.S.C. § 3161(h)(1)(F);

(5) that the time from October 13, 1983 to the entry of the instant order, during which time defendant's motion to dismiss was under advisement by this court, be excluded for purposes of Speedy Trial Act computation, pursuant to 18 U.S.C. § 3161(h)(1)(J);

(6) that the trial of this case to the court, on stipulated facts, be held on November 15, 1983, at 9:15 a.m.;

(7) that the Clerk of the Court mail copies of this memorandum and order to each of the parties.

HERBERT F. MURRAY,
United States District Judge

APPENDIX D

Speedy Trial Act, 18 U.S.C. § 3161

In pertinent part:

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—

(7) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

(8)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance

under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(II) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.